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No. 84-50

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION
and COLLEGE RETIREMENT EQUITIES FUND,
Petitioners,
-v.-
DIANA L. SPIRT, et al.,
Respondents.

BRIEF FOR AMICUS CURIAE THE STATE OF FLORIDA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF AMICUS CURIAE

The State of Florida submits this brief seeking reversal of the judgment of the Second Circuit, and in support of Part I of

the Petition For Writ of Certiorari. The state operates a unified pension system for all state employees and employees of approximately 1100 local governments.[1] Until August 1, 1983, options under the plan were based upon sex-distinct mortality tables.[2] The plan has been challenged in

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[1] Florida's Retirement System (hereafter FRS) is a defined benefit pension plan which provides, and historically has provided identical monthly benefits to all similarly situated male and female retirees under its first and primary single-life annuity option. Before August 1, 1983, the remaining three FRS elective joint annuitant options provided benefits based on sex-distinct mortality tables which resulted in lower monthly benefits for male retirees than similarly situated females.

[2] Following the Court's decision in Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, ___U.S.___, 77 L.Ed.2d 1236 (1983), the administrative rules and the mortality tables governing the payment of retirement benefits under the FRS were changed to provide identical monthly benefits to all similarly situated males and females

(Footnote continued on next page)

Long v. Florida, No. TCA 82-1056-WS (N.D. Fla.), and the district court is considering awarding retroactive relief against the FRS.[3] (A. 15-48). Depending

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retiring on or after August 1, 1983. The State of Florida accomplished the complete unisex conversion of its retirement system in just the three week period between the rendering of the Norris decision on July 6, 1983, and the effective date of the judgment, August 1, 1983. To accomplish this feat, emergency rules had to be promulgated until the permanent rules could take effect. See, §120.54, Fla. Stat. (1983). (A. 1-14).

[3] Long v. Florida is prinicipally a class action brought by males retired before August 1, 1983, or their joint annuitants, receiving benefits under one of the three joint annuitant elective options of the FRS. Their challenge to the FRS is based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq. (1982). Because the FRS offers a defined benefit plan, an award of retroactive relief would have to come from either increased future contributions by plan members, or from the taxpayers of both state and local government units.

upon the form of retroactive relief, the parties are in agreement that the undiscounted stream of future payments to class members after January 1, 1985 would cost the state between $57,500,000.00 and $144,200,000.00. (A. 49-54).

It is our position that the Court has established that awards in pension actions involving challenges to the use of sex-distinct mortality tables before August 1, 1983 should be prospective only. Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, _____U.S._____, 77 L.Ed.2d 1236 (1983). The failure of lower courts to follow the Court's directive in Norris is resulting in the very "unanticipated financial burdens" to the public that motivated the Court's decision to bar retroactive relief. Id. at 1263 and 1265. The Court's guidance is requested to

lay to rest once and for all the question of whether retroactive relief should be awarded in pension actions involving challenges to the use of sex-distinct mortality tables before August 1, 1983.

ARGUMENT

IN NORRIS THE COURT DETERMINED THAT RETROACTIVE RELIEF IN PENSION ACTIONS INVOLVING CHALLENGES TO THE USE OF SEX-DISTINCT MORTALITY TABLES BEFORE AUGUST 1, 1983 WAS INEQUITABLE AND SHOULD NOT BE AWARDED.

On both occasions when called upon to consider retroactive relief in the context of Title VII and pension plans, the Court has declined to award the requested relief. Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, ____U.S.____, 77 L.Ed.2d 1236 (1983), and Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702

(1978). The court's decisions in Norris and Manhart reflect its sensitivity to the unusually delicate balance of interests involved in Title VII challenges to pension plans. Recognizing the real danger in such instances of visiting upon the heads of innocent third persons the brunt of retroactive compliance with new developments in the law, this Court in both cases displayed its willingness to fashion equitable remedies designed to protect the interests of all involved.

Thus, in Manhart the Court recognized the "special dangers of retroactive Title VII awards in this field," and pointed out that "retroactive liability could be devastating for a pension fund." Manhart, 435 U.S. at 722-23. As the Court correctly observed, the real world result of the imposition of massive unfunded retroactive liability upon a pension fund is to

jeopardize the fund's continued solvency, and the future security of all its members. Obviously unwilling to endanger the retirement security of innocent retirees, the Court utilized the equitable powers available under Title VII to award prospective relief only.

When considering the question of retroactive relief in Norris, Justice Powell noted: "Manhart did put all employer-operated pension funds on notice that they could not 'require that men and women make unequal contributions to [the] fund . . . .'" 77 L.Ed.2d at 1262. Manhart, however, did not resolve all questions extant in the developing area of of Title VII's applicability to employer-sponsored and operated pension funds. Real and reasonable doubts remained as to the

precise scope of the Manhart holding. Such doubts were laid to rest by Norris.[4]

In Norris, for the first time, the Court decided that Title VII demands that all options under all employer-sponsored or operated pension plans must be calculated on a sex-neutral basis. The majority of the Court also concluded that Manhart had not sufficiently foreshadowed such a result and that retroactivity back to the date of the Manhart decision was not compelled. 77 L.Ed.2d at 1265.

In recognition of the broad scope of its decision in Norris, a majority of the Court concurred in a comparably broad-based equitable rule of relief designed to resolve all remaining disputes over

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[4] See, Hager & Zimpleman, The Norris Decision, Its Implications & Application, 32 Drake L. Rev. 913, 923-29 (1983).

retroactive relief in all employer-sponsored or operated pension plans: All post-August 1, 1983 contributions must be used to fund sex-neutral benefits; pre-August 1, 1983 contributions could continue to fund sex-distinct benefits. In fashioning this relief, the Court took the highly unusual action of delaying the effective date of its judgment. This, more than any other single fact, evidences the Court's intent to establish a uniform rule regarding Title VII and employer sponsored and operated pension plans, and to provide a reasonable time for employers to comply with the Court's mandate.

As mentioned earlier, in foreclosing retroactive relief in Norris, the Court recognized that such an exercise of its equitable discretion under Title VII was necessary to prevent the economic disruption of many pension plans under the weight

of massive unforeseen and unfunded liability. Understandably, the Court was unwilling to make the cost of retroactive compliance operate to the detriment of the future security of a multitude of innocent persons.[5] As the Court stated: "There is no justification for this court, particularly in view of the question left open in Manhart, to impose this magnitude of burden retroactively on the public." 77 L.Ed.2d at 1263.

Unfortunately, the lower courts are misapprehending the Court's decisions in Norris and Manhart. The court of appeals in Spirt, and the district court in Long have read those decisions in their

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[5] This is the central theme of Firefighters Local Union No. 1784 v. Stotts, ___U.S.___, 104 S.Ct. 2576 (1984), and, in a more general sense, a basic theme of American jurisprudence.

narrowest possible sense and have overlooked the broad policies enunciated by the Court.

In Spirt, the court of appeals grounded its exception to Norris on the fact that certain benefit levels for male annuitants were unspecified. 34 F.E.P. Cases 1510, 1513. The court reasoned that an award of retroactive relief was not precluded by the Court's holding in Norris, because the relief could come from the unsuspecting males without imposing a burden upon the employer or the plan.[6]

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[6] It is interesting that in the face of the Court's admonition to seek out equitable results in fashioning relief affecting innocent third persons, the court of appeals saw no inequity in ordering a reduction in the male annuitants' benefits simply because the men were without knowledge of the precise amount of their benefits, while the court would not order

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In Long, the State of Florida asserted that Manhart did not put employer-operated pension funds on notice that purely voluntary options in a defined benefit plan[7] funded with equal contributions and

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such a reduction if the men had been provided this information. While there may be a certain wit in saying what you don't know won't hurt you, it lacks something as a legal precept. To rely upon such a false distinction not only costs the legal system in integrity, but the men do suffer the loss of identifiable benefits. Since, "[a]s a class, women live longer than men," Manhart, 435 U.S. at 704, with the decision in Spirt, men will not only die earlier than women and receive less return on their pension investment, they must suffer the additional insult of a further reduction in their pension benefits "since they do not know what they are losing anyway." Such a result hardly comports with the equitable reasoning that formed the framework for Manhart and Norris.

[7] For a discussion of the distinctions between defined benefit plans and defined

(Footnote continued on next page)

unisex in its primary benefit violated Title VII. Despite the fact that Norris was the first case to definitively resolve the issues unanswered in Manhart, and despite Florida's immediate compliance with Norris's objectives, the district court distinguished Norris on the ground that Florida's pension system was employer-operated. (A. 30-33).

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contribution plans, see, U.S. Department of Labor Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits, at 7-10, and 11-12 (January, 1983). Ironically, because roughly 65 percent of all persons in non-federal government pension plans are in defined benefit plans, such as Florida's, which, under joint annuitant options, characteristically have provided male retirees with smaller monthly benefits than similarly situated females, a disproportionate burden for retroactive compliance may fall on innocent female pension members absent clarification of the Court's holding in Norris. See also, Bernstein, The Havoc In Retirement Benefits After Norris, 70 A.B.A. J.80 (February, 1984).

In Norris, the Court designated August 1, 1983 as the date for employer pension plans to be in compliance with Title VII. The line painted by the Court marking August 1, 1983 is being blurred by inconsistent lower court interpretations of the Court's decision. The continued viability of employer sponsored or operated pension plans requires that this and all other courts speak with one voice on the matter. A proliferation of exceptions to the Norris rule of non-retroactivity only serves to handicap employers and insurers in their attempt to comply with Title VII as interpreted in Manhart and Norris. The State of Florida would ask that the Court repaint the line drawn in Norris in a color all can see.

CONCLUSION

Contrary to policies enunciated in Norris, a patch-work approach to retroactive relief in pension suits is developing. All we are requesting is that the Court require a consistent application of Norris. Accordingly, the State of Florida respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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A P P E N D I X

120.54 Rulemaking; adoption procedures.-

(1) Prior to the adoption, amendment, or repeal of any rule not described in subsection (9), an agency shall give notice of its intended action, setting forth a short and plain explanation of the purpose and effect of the proposed rule, the specific legal authority under which its adoption is authorized, and a summary of the estimate of the economic impact of the proposed rule on all persons affected by it.

(a) Except as otherwise provided in this paragraph, the notice shall be mailed to the committee, to all persons named in the proposed rule, and to all persons who have made requests of the agency for advance notice of its proceedings at least 14 days prior to such mailing. The agency shall also give such notice as is prescribed by rule to those particular classes of persons to whom the intended action is directed. Notice of intent by an educational unit to adopt, amend, or repeal any rule not described in subsection (9) shall be made:

1. By publication in a newspaper of general circulation in the affected area;

2. By mail to all persons who have made requests of the educational unit for advance notice of its proceedings and to organizations representing persons affected by the proposed rule; and

3. By posting in appropriate places so that those particular classes of persons to whom the intended action is directed may be duly notified.

Such publication, mailing, and posting of notice shall occur at least 14 days prior to the intended action.

(b) The notice shall be published in the Florida Administrative Weekly not less than 21 days prior to the intended action, except that notice of actions proposed by educational units or units of government with jurisdiction in only one county or a part thereof need not be published in the Florida Administrative Weekly or transmitted to the committee. The proposed rule shall be available for inspection and copying by the public at the time of the publication of notice.

(2)(a) Each agency, prior to the adoption, amendment, or repeal of any rule, shall provide information on its proposed action by preparing a detailed economic impact statement. The economic impact statement shall include:

1. An estimate of the cost to the agency of the implementation of the proposed action, including the estimated amount of paperwork;

2. An estimate of the cost or the economic benefit to all persons directly affected by the proposed action;

3. An estimate of the impact of the proposed action on competition and the open market for employment, if applicable; and

4. A detailed statement of the data and method used in making each of the above estimates.

(b) If an economic impact statement is required before an agency takes action on an application or petition by any person,

the statement shall be prepared within a reasonable time after the application is made or the petition is filed.

(c) The failure to provide an adequate statement of economic impact is a ground for holding the rule invalid; however, beginning October 1, 1978, no rule shall be declared invalid for want of an adequate statement of economic impact unless the issue is raised in an administrative or judicial proceeding within 1 year of the effective date of the rule to which the statement applies.

(3) If the intended action concerns any rule other than one relating exclusively to organization, procedure, or practice, the agency shall, on the request of any affected person received within 14 days after the date of publication of the notice, give affected persons an opportunity to present evidence and argument on all issues under consideration appropriate to inform it of their contentions. Prisoners, as defined in s. 944.02(5), may be limited by the Department of Corrections to an opportunity to submit written statements concerning intended action on any department rule. The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule. Any material pertinent to the issues under consideration submitted to the agency within 14 days after the date of publication of the notice or submitted at a public hearing shall be considered by the

agency and made a part of the record of the rulemaking proceeding.

(4)(a) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.

(b) The request seeking a determination under this subsection shall be in writing and must be filed with the division within 14 days after the date of publication of the notice. It must state with particularity facts sufficient to show that the person challenging the proposed rule would be substantially affected by it and facts sufficient to show the invalidity of the proposed rule.

(c) Immediately upon receipt of the petition, the division shall forward copies of the petition to the agency whose rule is challenged, the Department of State, and the committee. Within 10 days after receiving the petition, the division director, if he determines that the petition complies with the above requirements, shall assign a hearing officer who shall conduct a hearing within 30 days thereafter, unless the petition is withdrawn. Within 30 days after conclusion of the hearing, the hearing officer shall render his decision and state the reasons therefor in writing. The division shall forthwith transmit copies of the hearing officer's decision to the Department of State and to the committee. The hearing officer may declare the proposed rule wholly or partly

invalid. The proposed rule or provision of a proposed rule declared invalid shall be withdrawn from the committee by the adopting agency and shall not be adopted. No rule shall be filed for adoption until 21 days after the notice required by subsection (1) or until the hearing officer has rendered his decision, as the case may be. However, the agency may proceed with all other steps in the rulemaking process. In the event part of a proposed rule is declared invalid, the adopting agency may, in its sole discretion, withdraw the proposed rule in its entirety. The agency whose proposed rule has been declared invalid in whole or part shall give notice of the decision in the first available issue of the Florida Administrative Weekly.

(d) Hearings held under this provision shall be conducted in the same manner as provided in s. 120.57 except that the hearing officer's order shall be final agency action. The agency proposing the rule and the person requesting the hearing shall be adversary parties. Other substantially affected persons may join the proceeding as parties or intervenors on appropriate terms which will not substantially delay the proceedings. Failure to proceed under this subsection shall not constitute failure to exhaust administrative remedies.

(5) Any person regulated by an agency or having a substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or to provide the

minimum public information required by s. 120.53. The petition shall specify the proposed rule and action requested. Not later than 30 calendar days after the date of filing a petition, the agency shall initiate rulemaking proceedings under this act, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.

(6) In rulemaking proceedings, the agency may recognize any material which may be judicially noticed, and it may provide that materials so recognized shall be incorporated into the record of the proceeding. Before the record of any proceeding is completed, all parties shall be provided a list of such materials and given a reasonable opportunity to examine them and offer written comments thereon or written rebuttal thereto.

(7) Each rule adopted shall be accompanied by a reference to the specific rulemaking authority pursuant to which the rule was adopted and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific.

(8) Each rule adopted shall contain only one subject and shall be preceded by a concise statement of the purpose of the rule and reference to the rules repealed or amended, which statement need not be printed in the Florida Administrative Code. Pursuant to rule of the Department of State, a rule may incorporate material by reference but only as such material exists on the date the rule is adopted.

For purposes of such rule, changes in such material shall have no effect with respect to the rule unless the rule is amended to incorporate such material as changed. No rule shall be amended by reference only. Amendments shall set out the amended rule in full in the same manner as required by the constitution for laws.

(9)(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger by any procedure which is fair under the circumstances and necessary to protect the public interest, provided that:

1. The procedure provides at least the procedural protection given by other statutes, the Florida Constitution, or the United States Constitution.

2. The agency takes only that action necessary to protect the public interest under the emergency procedure.

3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one county or a part thereof, shall be published in the first available issue of the Florida Administrative Weekly. The agency's findings of immediate danger, necessity,

and procedural fairness shall be judicially reviewable.

(b) Rules pertaining to the public health, safety, or welfare shall include, but not be limited to, those rules pertaining to perishable agricultural commodities.

(c) An emergency rule adopted under this subsection may not be effective for a period longer than 90 days and shall not be renewable. However, the agency may take identical action by normal rulemaking procedures.

(d) Subject to applicable constitutional and statutory provisions, an emergency rule becomes effective immediately on filing, or at a date less than 20 days thereafter if specified in the rule, if the adopting agency finds that such effective date is necessary because of immediate danger to the public health, safety, or welfare.

(10) The Administration Commission shall promulgate one or more sets of model rules of procedure which shall be reviewed by the committee and filed with the Department of State. On filing with the department, the appropriate model rules shall be the rules of procedure for each agency subject to this act to the extent that each agency does not adopt a specific rule of procedure covering the subject matter contained in the model rules applicable to that agency. An agency may seek modification of the model rules of procedure to the extent necessary to conform to any requirement imposed as a condition precedent to receipt of federal funds or permit persons in this state to receive tax benefits under federal

law or as required for the most efficient operation of the agency as determined by the Administration Commission. The reasons for the modification shall be published in the Florida Administrative Weekly. Agency rules adopted to comply with ss. 120.53 and 120.565 must be in substantial compliance with the model rules.

(11)(a) The adopting agency shall file with the committee, at least 21 days prior to the proposed adoption date, a copy of each rule it proposes to adopt; a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of the estimate of economic impact required by subsection (2); a statement of the extent to which the proposed rule establishes standards more restrictive than federal standards or a statement that the proposed rule is no more restrictive than federal standards or that a federal rule on the same subject does not exist; and the notice required by subsection (1). After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, the adopting agency shall file any changes in the proposed rule and the reasons therefor with the committee or advise the committee that there are no changes. In addition, when any change is made in a proposed rule, other than a technical change, the adopting agency shall provide a detailed statement of such change by certified mail or actual delivery to any person who requests it in writing at the public hearing. The agency shall file the change with the committee, and provide the

statement of change to persons requesting it, at least 7 days prior to filing the rule for adoption. Educational units, other than units of the State University System and the Florida School for the Deaf and the Blind, and local units of government with jurisdiction in only one county or part thereof shall not be required to make filings with the committee. This paragraph does not apply to emergency rules adopted pursuant to subsection (9). However, agencies, other than those listed herein, adopting emergency rules shall file a copy of each emergency rule with the committee.

(b) If the adopting agency is required to publish its rules in the Florida Administrative Code, it shall file with the Department of State three certified copies of the rule it proposes to adopt, a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule. Agencies not required to publish their rules in the Florida Administrative Code shall file one certified copy of the proposed rule, and the other material required above, in the office of the agency head; and such rules shall be open to the public pursuant to s. 120.53(2). Filings shall be made no less than 21 days nor more than 90 days after the notice required by subsection (1). If a public hearing is held, the 90-day limit is extended to 21 days after adjournment of the final hearing on the rule, 21 days after receipt of all material

authorized to be submitted at the hearing, or 21 days after receipt of the transcript, if one is made, whichever is latest. At the time a rule is filed, the agency shall certify that the time limitations prescribed by this subsection have been complied with and that there is no administrative determination pending on the rule. The department shall reject any rule not filed within the prescribed time limits or upon which an administrative determination is pending. If a rule has not been adopted within the time limits imposed by this section, the agency proposing the rule shall withdraw the rule and give notice of its action in the same manner as is prescribed in paragraphs (1)(a) and (b).

(12)(a) The proposed rule shall be adopted on being filed with the Department of State and become effective 20 days after being filed, on a later date specified in the rule, or on a date required by statute. Rules not required to be filed with the Department of State shall become effective when adopted by the agency head or on a later date specified by rule or statute.

(b) After the notice required in subsection (1) and prior to adoption, the agency may withdraw the rule in whole or in part or may make such changes in the rule as are supported by the record of public hearings held on the rule, technical changes which do not affect the substance of the rule, changes in response to written material relating to the rule received by

the agency within 14 days after the notice and made a part of the record of the proceeding, or changes in response to a proposed objection by the committee. After adoption and before the effective date, a rule may be modified or withdrawn only in response to an objection by the committee or may be modified to extend the effective date by not more than 60 days when the committee has notified the agency that an objection to the rule is being considered. The agency shall give notice of its decision to withdraw or modify a rule in the first available issue of the publication in which the original notice of rulemaking was published and shall notify the Department of State if the rule is required to be filed with the Department of State. After a rule has become effective, it may be repealed or amended only through regular rulemaking procedures.

(13) If the committee disapproves a proposed rule and the agency does not modify the rule, the committee shall file with the Department of State a notice of the disapproval detailing with particularity its objection to the rule. The Department of State shall publish this notice in the Florida Administrative Weekly and shall publish, as a history note to the rule when it is published in the Florida Administrative Weekly and shall publish, a reference to the committee's disapproval and to the issue of the Weekly in which the full text thereof appears.

(14) No agency has inherent rulemaking authority; nor has any agency authority to

establish penalties for violation of a rule unless the Legislature, when establishing a penalty, specifically provides that the penalty applies to rules. However, an agency may adopt rules necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be enforced until the statute upon which they are based is effective.

(15) The rulemaking provision of this chapter do not apply to compensation appeals referees.

(16) Rulemaking proceedings shall be governed solely by the provisions of this section unless a person timely asserts that his substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests. If the agency determines that the rulemaking proceeding is not adequate to protect his interests, it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of s. 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

History.-s. 1, Ch. 74-310; s. 3, ch. 75-191; s. 3, ch. 76-131; s.s. 1, 2, ch. 76-276; s. 1, ch. 77-174; s. 13, ch. 77-290; s. 3, ch. 77-453; s. 2, ch. 78-28; s. 2, ch. 78-425; s. 7, ch. 79-3; s. 3, ch. 79-299; s. 69, ch. 79-400; s. 5, ch. 80-391; s. 1 ch. 81-309; s. 2, ch. 83-351.
cf.-s. 161.161 Beach erosion control hearings, additional notice requirement.
2. 403.8055 Department adoption of federal standards.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HUGHLAN LONG
and S. DEWEY HAAS,
individually and on
behalf of all retired
and present employees
subject to the Florida
Retirement System
established by Chapter
121, Florida Statutes,
and all joint annuitants
thereunder,

Plaintiffs,

v.

THE STATE OF FLORIDA,
a governmental body,
THE HONORABLE ROBERT
GRAHAM, as Governor of
the State of Florida,

Defendants.

TCA 82-1056-WS

ORDER

This cause was heard by the court on February 8, 1984, on plaintiffs' and defendants' cross-motions for summary judgment. Argument was also heard on several other pending motions. The court

having considered the record and having heard the argument of counsel and being otherwise fully advised in the premises, it is ORDERED AND ADJUDGED;

1. Defendants' motion to abstain and dismiss or stay is DENIED as moot.

2. Defendants' motion to dismiss as to plaintiff Long is GRANTED for all claims except the Title VII claim. Res judicata bars all claims which were or could have been raised in the previous suit. Allen v. McCurry, 449 U.S. 90, 94 (1980). Under 28 U.S.C. § 1738, federal courts are required to give the same preclusive effect to a state judgment as the judgment would be given in that state. Federal courts therefore must look to state law in determining preclusive effect. The Florida Supreme Court ruled in Gordon v. Gordon, 59 So. 2d 40, 44 (Fla.), cert. denied, 344 U.S. 478 (1952), that res judicata "bars a

subsequent suit between the parties based on the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised . . . ."

Plaintiff Long in this case raised his Title VII claim in an administrative appeal to the Florida First District Court of Appeal. That court ruled that it had no jurisdiction to hear the Title VII claim. Long v. Dept. of Administration, Division of Retiremnt, 428 So. 2d 688 (Fla. 1st DCA 1983). Until that ruling, the law was not settled as to whether a Title VII action could be brought in that court. Plaintiff was therefore precluded from fully litigating his Title VII claims and cannot be said to have had a "full and fair opportunity" to present his case.

Defendants argue that state law provides a remedy similar to that of Title

VII and that, since plaintiff Long could have raised the state law claim and did not, his Title VII claim should be barred as well. Under Kremer v. Chemical Construction Corp., 456 U.S. 461 (1980), it is clear that a plaintiff whose cause has been fully litigated under a state law "at least as broad" as Title VII will be collaterally estopped from relitigating the issue of employment discrimination under Title VII.

However, where a plaintiff has not raised a similar state statute and the claim has not been fully litigated, it cannot be said that his Title VII claim is collaterally estopped. Moreover, the plaintiff cannot be barred by res judicata from bringing a cause of action which could not have been raised in the previous suit. The fact that another claim could have been raised is not germane.

In the case at bar, the state court had not yet ruled as to its jurisdiction over Title VII claims. Plaintiff Long duly raised this claim but did not obtain a judgment on the merits. Under these circumstances, plaintiff cannot be barred from raising this claim in federal court.

3. Mr. Carl A. Rassler's motion to intervene as plaintiff is GRANTED.

4. Plaintiff's motion for rehearing on decertification of class "B" is DENIED. This court is under a mandate to protect the interests of the nonappearing class members and to continually reassess the appropriateness of the class certification. Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 n. 11 (1978); Grigsby v. North Mississippi Medical Center, Inc., 586 F.2d 457, 462 (5th Cir. 1978). The class as originally stipulated to by the parties and certified by the

court included all male persons retired and receiving benefits under options 2, 3, or 4 of Florida Retirement System, all male persons currently employed who are entitled to vested pension or retirement plan benefits, and all persons, male or female, holding rights as joint annuitants under the Florida Retirement System.

Because the Florida Retirement System (FRS) was changed as of August 1, 1983, to conform to the nondiscrimination requirements of Title VII, the court deems it necessary to distinguish the claims of those class members retiring on or after that date. Under Federal Rule of Civil Procedure 23(c)(1), "[t]he district court has a continuing power" to alter or amend its certification order before decision on the merits. Elster v. Alexander, 608 F.2d 196, 197 (5th Cir. 1979). Rule 23(c)(4) gives the court power to divide the class

into subclasses. The court hereby modifies its certification ruling to certify class members retiring on or after August 1, 1983, as a subclass in the present action under Federal Rule of Civil Procedure 23(b)(2). The court hereby decertifies those same class members under Federal Rules of Civil Procedure 23(b)(1) and (b)(3).

Class members who retired before August 1, 1983, remain certified under Federal Rules of Civil Procedure 23(b)(1), (b)(2), and (b)(3).

5. Plaintiffs' motion for discovery sanctions is DENIED at this time. The court reserves the right to modify this ruling at a later time if it deems it necessary.

6. Plaintiffs' pendent state law claims are DISMISSED under Pennhurst State

School and Hospital v. Halderman, 52 U.S.L.W. 4155 (1984).

7. Plaintiffs' claims under 42 U.S.C. § 1983 are DISMISSED. Under the U.S. Supreme Court's rationale in Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366 (1979), to allow the plaintiffs to maintain an action under § 1983 on substantive rights created by Title VII would defeat the "comprehensive plan" designed by Congress in enacting Title VII by allowing plaintiffs to "completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress." 442 U.S. at 376.

Plaintiffs also base their § 1983 claim on the equal protection clause of the fourteenth amendment. In Shinholster v. Graham, 527 F. Supp. 1318 (N.D. Fla. 1981), this court held that claims for money damages under § 1983 against the state and

state officials in their official capacities are barred by the eleventh amendment. Under the test laid down in Harlow v. Fitzgerald, 457 U.S. 800 (1982), defendants have qualified immunity in their individual capacities unless their actions violated "clearly established statutory or constitutional rights." Because, in Long v. Department of Administration, Division of Retirement, 428 So. 2d 688 (Fla. 1st DCA 1983), the state court held that FRS was not violative of the fourteenth amendment, the defendants could not have violated clearly established law.

Of the remedies available under § 1983, only prospective injunctive relief remains. However, according to plaintiffs' brief, their prayer for future relief is considered "retroactive" because it will require retroactive funding of the FRS contribution base. Prospective injunctive

relief is therefore inappropriate, and plaintiffs' claims under § 1983 are dismissed as unredressable.

8. Defendants' motion for dismissal for lack of Article III subject matter jurisdiction is DENIED.

9. Defendants' motion to dismiss as to plaintiff Haas is DENIED.

10. Also before the court for consideration is the motion of Vertie V. Prater to withdraw her request for exclusion from the class. Mrs. Prater states that she did not understand her rights when she asked to be excluded, and, now that she does understand, she would like to be allowed to participate. Defendants oppose the motion on the grounds that Mrs. Prater's reasons for wishing to withdraw her request are not exceptional and could easily apply to all other potential class members who have opted

out. Defendants contend that a precedent would be set which would allow a number of potential class members to opt back in. They therefore do not consent to her reinstatement and claim they would be prejudiced thereby. The only case cited to the court on this issue allowed the class member to reenter the class. In that case, the member's reentry was stipulated to be the parties, and the court determined there would be no prejudice to either side. Under the law pertaining to Rule 23(b)(3) class actions, Mrs. Prater had thirty days in which to determine her rights before opting out. Because defendants oppose this motion and claim prejudice to their case, the motion by Mrs. Prater to withdraw her request for exclusion is DENIED.

11. Plaintiffs' motion for summary judgment under Title VII is GRANTED as to

liability. The court hereby awards declaratory relief only.

12. The determination of whether this court has the discretion to award damages in this case rests on the question of the preclusive effect of the Supreme Court's "prosepctive-only" decision in Arizona Governing Committee v. Norris, ___U.S.___, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (1983). Retroactive damages were denied in Norris for two main reasons, one given in Justice Powell's opinion and one in Justice O'Connor's opinion. Writing for the majority on damages (with Justice O'Connor concurring separately), Justice Powell emphasized that the question of whether Title VII would be applied to an employer providing a retirement benefit program through private insurance companies had not been decided by the Court. City of Los Angeles, Dept. of Water & Power v. Manhart,

435 U.S. 702 (1978), had expressly said: "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefits which his or her accumulated contributions could command in the open market." Norris, 77 L. Ed. 2d at 1250, quoting Manhart, 435 U.S. at 717-718. Thus, Justice Powell concluded that, because of this open market exception, employers had no previous notice that third-party insurer programs could be illegal. He therefore denied retroactive damages, stating that "[a]n employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market." 77 L. Ed. 2d at 1263.

Justice O'Connor, however, did not agree that the Court's holding concerning third-party insurers was unforeshadowed. She found that "[d]espite Justice Powell's argument, the result in Manhart is not distinguishable from the present situation." 77 L. Ed. 2d at 1264. She, on the other hand, was concerned that retroactive damages would "jeopardize the entire pension fund," and therefore made the award prospective only. Moreover, she was convinced that a retroactive holding was not necessary to force pension plan administrators "who may have thought until our decision today that Title VII did not extend to plans involving third-party insurers," to conform to the Court's decision. 77 L. Ed. 2d at 1265.

The issue of "open market" annuities, on which the Norris denial of retroactive damages centered, is not applicable to the

case at bar. The Florida Retirement System is employer-operated and mandatory for its employees. Thus, although the precise issue of unequal benefits was decided in Norris, the court finds that the denial of retroactive damages in Norris is not preclusive in this case.

In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court established a strong presumption in favor of back pay for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421. The court went on to say that good faith is not a defense to a Title VII violation, and a showing of bad faith is not required. Id. at 422-23.

Although recognizing the presumption that retroactive damages are appropriate in Title VII cases once liability is established, both Norris and Manhart advised caution in the award of damages. "The Albermarle presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district court's duty to determine that such relief is appropriate." Manhart, 435 U.S. at 719. In denying retroactive damages, the Court in Manhart gave three grounds for the action: (1) because it was a "marked departure from past practice, . . . conscientious and intelligent administrators . . . may well have assumed that a program like the Department's was entirely lawful"; (2) "[t]here is no reason to believe that the threat of a back pay award is needed to cause other administrators to amend their practices to

conform to this decision"; and (3) "[r]etroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties." Id. at 720-23. On these three grounds, the court denied retroactivity "[w]ithout qualifying the force of the Albemarle presumption in favor of retroactive relief. . . ." Id.

Justice O'Connor, in her Norris concurrence, gave a similar analysis, using the guidelines set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Chevron gave three criteria: (1) whether the decision establishes "a new principle of law, either by overruling clear precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) "whether retroactivity will further or retard the operation of the state"; (3) "whether retroactive application would

impose inequitable results." These criteria are substantially similar to the criteria used in Manhart. The mandate of the Supreme Court requires these criteria to be applied in determining the appropriate remedy in this case.

The precedent in this circuit for back pay awards was clearly established in James v. Stockham Valves & Fittings Company, 559 F.2d 310, 357 (5th Cir. 1977), and Pettway v. American Cast Iron Pipe Company, 494 F.2d 211, 252-53 (5th Cir. 1975), modified on other grounds, 576 F.2d 1157 (5th Cir. 1978). Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981). The current Fifth Circuit has recently reaffirmed these earlier rulings in Carpenter v. Stephen F. Austin State University, 706 F.2d 608 (1983). Citing James, Pettway, and Albemarle, the Fifth Circuit wrote:

> The statutory mandate of Title VII does not automatically require the court to exercise its equitable powers and award back pay in all circumstances; nevertheless, as the district court correctly observed, the remedial purposes of Title VII command back pay relief in all but "special circumstances." The court's discretion to deny back pay, once the class has been shown to have sustained economic loss, is "narrow."

Id. at 631.

Defendants contend that the Norris decision and not Manhart constituted the first notice that the Florida Retirement System benefit plan violated Title VII prohibitions. The Manhart decision held that an employer-operated pension fund that required women to make larger contributions than men to obtain equal benefits violated Title VII. The Court recognized that the pension system was founded on actuarily sound life expectancy tables. It, however, determined that sex could not be the

discriminating factor in determining life expectancy. The Court found that Title VII focused on the individual and not the class, and that classifications in the employment context on the basis of sex, no matter how sound, were illegal.

> The statute makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(1) [42 USCS §2000e-2(a)(1)] (emphasis added). The state's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.

435 U.S. at 708.

> An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner

> which but for that person's sex would be different."

435 U.S. at 711.

The Florida Retirement System calls for equal contributions but distinguishes between men and women in benefit levels under three of four options. Norris involved a similar situation. Defendants therefore claim that Norris and not Manhart decided the principle of law that applies to this case. In deciding Norris, however, the majority of the Supreme Court relied almost exclusively on the Court's decision in Manhart. Justice Marshall quotes extensively from the Manhart language, as does Justice O'Connor in her concurrence:

> The court in Manhart found Title VII's focus on the individual to be dispositive of the present question. Congress in enacting Title VII intended to prohibit an employer from singling out an employee by race or sex for the purpose of imposing a greater burden or denying an equal benefit because of a characteristic

> statistically identifiable with the group but empirically false in many individual cases. See Manhart, 435 U.S., at 708-710, 55 L. Ed. 2d 657, 98 S. Ct. 1370.

77 L. Ed. 2d at 1264. The dissent in Norris does not challenge the majority finding on this issue. Rather, the dissent disagrees with the third-party insurer liability finding.

Like the Court in Norris and every other court but one that decided the issue, I see no meaningful distinction between discrimination at the pay-in stage as in Manhart and in the pay-out stage as in the case at bar. In either case, there is discrimination in compensation for equal work on the basis of sex, as prohibited by Title VII. As Manhart said, "[O]ne cannot say that an actuarial distinction based entirely on sex is 'based on any other factor than sex.' Sex is exactly what it is based on." 435 U.S. at 712-13 quoting

553 F.2d 581, 588 (9th Cir. 1976). Manhart condemned the use of sex-based actuarial tables. Even though the particular facts of that case dealt with the pay-in stage only, the state could not have reasonably assumed, in light of the Court's rationale and explicit language, that it could nevertheless continue to use sex-based tables at the pay-out stage.

As early as 1972, the Equal Employment Opportunity Commission promulgated federal regulations under "Guidelines on Discrimination Because of Sex," stating: "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which . . . differentiates in benefits on the basis of sex." 29 C.F.R. § 1604.9(f)(1980). Suits were filed concerning this issue as early as 1974. (See Spirt v. Teachers Insurance & Annuity Association, 691 F.2d 1054, 1067 (2nd Cir.

1982).) The Supreme Court's decision in Manhart came down in 1978. After Manhart, as Justice Marshall notes in Norris, every lower court but one found liability on this issue. Thus, neither the Supreme Court's decision on this issue in Norris nor this order today establishes a new principle of law or a marked, unforeshadowed overruling of precedent. Under the first criterion, then, retroactive damages would not be prohibited.

Regarding the second criterion, Justice O'Connor explained: "Manhart held that a central purpose of Title VII is to prevent employers from treating individual workers on the basis of sexual or racial group characteristics." Norris, 77 L. Ed. 2d at 1265. It is difficult to see how awarding retroactive damages in this case would "retard the operation" or "frustrate the purpose" of the statute.

The third criterion requires the court to consider the impact of retroactive damages on the pension fund. Although the necessity of using public funds to provide damages is not sufficient reason to deny back pay awards, Carpenter, 706 F.2d at 632, Norris and Manhart both compel this court to consider whether the award would devastate the pension fund and harm "innocent third parties." The information before the court at this time is not sufficient for a decision on this point, and the parties are therefore requested to prepare appropriate memoranda. Defendants, according to their letter of February 14, 1984, were to provide the court with the results of their research by March 10. Defendants are directed to do so by March 23. Plaintiffs shall have ten days thereafter to respond.

DONE AND ORDERED this _____ day of March, 1984.

_____
WILLIAM STAFFORD
CHIEF JUDGE

IN THE UNITED STATE DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs,

v.

STATE OF FLORIDA, et al.,
Defendants.

TCA 82-1056

ORDER

Before the court for consideration is defendants' motion for reconsideration of the liability finding in the court's order of March 16, 1984. Defendants contend that (1) intent to discriminate was not established and (2) the fourteenth amendment, the consitutional source for Title VII as applied to governmental employers, requires the establishment of discriminatory motive or animus.

Defendants seek to argue that "plaintiffs to prevail under Title VII must

first prove defendants' intent to discriminate, must first prove defendants' discriminatory motive or animus even to establish actionable liability." (Document 2717, p. 13) Defendants also endeavor to distinguish the intent issue from the "bad faith" issue previously found irrelevant by this court under the rule of Albemarle Paper Co. v. Moody, 422 U.S. 405, 422-23 (1975). Defendants cite numerous cases supporting the proposition that intent is a requisite element in a discrimination case brought under the fourteenth amendment. The court is well aware of that requirement. It is irrelevant in this case, however, as the plaintiffs' fourteenth amendment claim has already been dismissed by the court's previous order.

Defendants cite no cases holding intent as a necessary element in a Title VII case. Indeed, it appears that they could

not, for the question of intent was disposed of by the former Fifth Circuit in 1979. In Scott v. City of Anniston, Alabama, 597 F.2d 897 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980), defendants put forward the same argument used here. In response, Judge Rubin wrote:

> We hold, on both principle and authority, that proof of intentional discrimination is not essential to recovery in a Title VII action even when the employer is a government agency, and that the requirement of equal employment opportunity prohibits all invidious employment practices, even those not intended to achieve a prohibited end.

To the extent that plaintiffs' Title VII claim can be considered a disparate treatment claim rather than a disparate impact claim, proof of discriminatory motive would be necessary. Burdine v. Texas Department of Community Affairs, 608 F.2d 563, 566 (5th Cir. 1979). This requires proof that plaintiff was treated

differently because of gender. Id. If reconsideration and clarification of the court's summary judgment order is necessary, the court has no difficulty determining that the State of Florida treated people differently in its retirement system because of their gender. No other reasonable interpretation can be placed on the use of sex-based actuarial tables. The United States Supreme Court in City of Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978), held that the use of such tables was discriminatory because individuals were treated differently because of the membership in a gender-defined class. Defendant's liability in the case at bar follows from Manhart.

As reflected in the March 16 court order, the only issue remaining in this case is the amount of damages and the

potential impact on the Florida Retirement System (FRS) of a retroactive reward. Plaintiffs and defendants have filed memoranda and affidavits on this question, but there is considerable disagreement between the methods used and the resulting figures. It is apparent that more direction is needed from the court as to the measure of damages and the size of the class. Specifically, the court determines:

(1) Potential class members who previously opted out should, of course, not be included in the calculations of damages in this case.

(2) The measure of damages will be calculated in two ways: first, the difference between the benefits actually paid and those that would have been paid had the FRS adopted the "unisex" tables now in use; second, the "topping up" difference between male and female benefits. For

purposes of the "topping up" method, the calculations shall be done with a change in the gender of the male member only. No change in the gender of the joint annuitant should be considered. The parties should thus agree on two figures, one for the "unisex" level of benefits, and one for "topping up."

(3) The class of retirees entitled to recover damages will be limited to those retiring after April 25, 1978, the date of the Supreme Court decision in Manhart, 435 U.S. 702 (1978). Manhart denied the award of retrosepctive damages for the reasons set out in the previous order. Therefore, had this court awarded damages immediately after Manhart, it would have been limited to prospective-only awards, i.e., only for those retiring after that decision came down. Since this court has determined the law as set forth in Manhart to be

dispositive of this case, damages retrospective from that date would not be appropriate.

With these guidelines, the parties are directed to consult and agree on the proper amount of lump-sum damages for the time period from April 25, 1978, to January 1, 1985 -- taking January 1, 1985, as a hypothetical award date. Parties shall also stipulate to a reasonable rate of interest and the amount of future benefits, separating those to be immediately funded and those to be funded later. The parties are directed to submit their stipulated results to the court no later than May 31, 1984.

With the proper damages amount before the court, a hearing may then be set to determine the potential impact of that amount on the FRS.

It is there ORDERED and ADJUDGED:

1. Defendants' motion for reconsideration (document 2719) is DENIED.

2. The parties are directed to consult and submit the report described in the order no later than May 31, 1984.

DONE and ORDERED this _____ day of April, 1984.

_____
WILLIAM STAFFORD
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs,

v. CASE NO. TCA 82-1056

STATE OF FLORIDA, et al.,

Defendants.

_____/

STIPULATION

Pursuant to the terms of the Court's order of April 25, 1984 (Doc. 2726) and subject to the conditions specified in that Order, the parties hereby stipulate and agree:

1. If the Court were to order "topping up" damages to those class members who retired on or after April 25, 1978 and before August, 1983, for the entire benefit payment to such members, changing only the gender of the male class members, and using

the actuarial equivalency factors in effect prior to August 1, 1983, the amounts payable from the Florida Retirement System would be as follows:

a) Principal amounts to class members between April 25, 1978 and December 31, 1984 would be between $15,600,000 and $15,829,000.

b) Interest at 12% simple interest on the principal payments in subparagraph (a) would be between $4,000,000 and $4,559,000.

c) The undiscounted stream of future payments to class members after January 1, 1985 would be approximately $144,200,000.

d) The actuarial present value of future payments to class members on January 1, 1985 would be

between $52,100,000 and $54,272,000.

2. If the Court were to order that class members retiring after April 25, 1978 and before August 1, 1983 were entitled to have their entire benefit adjusted to that indicated by the appropriate unisex values contained in the actuarial equivalency tables adopted by the Florida Retirement System on August 1, 1983, the amounts payable from the Florida Retirement System Trust Fund would be as follows:

a) Principal payments to members between April 25, 1978 and December 31, 1984 would be between $6,400,000 and $6,294,000.

b) Interest at 12% simple interest on the principal payments in subparagraph (a) would be

between $1,700,000 and $1,810,000.

c) The undiscounted stream of future payments to class members after January 1, 1985 would be approximately $57,500,000.

d) The actuarial present value of future payments to class members on January 1, 1985 would be between $21,000,000 and $21,959,000.

3. This stipulation is subject to the positions of the parties stated in their motions for partial reconsideration of the Court's Order of April 25, 1984.

The parties so stipulate this 30th day of May, 1984.

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